Supreme Court, U.S.
FILED
JAN 22 1993
OFFICE OF THE CLERK

No. 92-479

IN THE

Supreme Court of the United States

October Term 1992

TXO PRODUCTION CORP.,

Petitioner,

v.

ALLIANCE RESOURCES CORP., TUG FORK LAND COMPANY, GEORGE KING, and GROVER C. GOODE,

Respondents.

On Writ of Certiorari to the Supreme Court of Appeals of West Virginia

BRIEF OF THE WASHINGTON LEGAL FOUNDATION AS *AMICUS CURIAE* IN SUPPORT OF PETITIONER

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January 22, 1993

CASILLAS PRESS, INC., 1717 K STREET, N.W., WASHINGTON, D.C. 20036

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BRIEF OF THE WASHINGTON LEGAL FOUNDATION AS *AMICUS CURIAE* IN SUPPORT OF PETITIONER

INTEREST OF THE *AMICUS CURIAE*

The Washington Legal Foundation (WLF) is a non-profit public interest law and policy center based in Washington, D.C. with over 100,000 members and supporters nationwide. WLF regularly appears before federal and state courts promoting economic liberty, free enterprise principles, and a limited and accountable government. WLF's Legal Studies Division also publishes monographs and other publications on these topics.

In particular, WLF has devoted substantial resources over the years through litigation and publishing to promote civil justice reform, including tort reform and opposing excessive punitive damages and attorney's fees awards. *See, e.g., Haslip v. Pacific Mutual*, 111 S.Ct. 1032 (1991); *Farrar v. Hobby*, 113 S.Ct. 566 (1992); Stephen M. Turner, et al., *Punitive Damages Explosion: Fact or Fiction?* (WLF, Working Paper Series No. 50, Nov. 1992); Victor E. Schwartz, *Punitive Damages: Should The*

Constitution Of The United States Provide Boundaries? (WLF Legal Backgrounder, May 1989); Theodore B. Olson and Theodore J. Boutrous, *The Constitutionality of Punitive Damages* (WLF Legal Backgrounder, March 1989). Excessive and unpredictable punitive damages awards are ultimately harmful to the economy, workers, and consumers.

WLF believes that it can bring a broader perspective on the issues presented in this case which will assist this Court in deciding the case in such a way as to give clearer guidance to state courts on the imposition of punitive damages. By letters filed with the Clerk of the Court, the parties have consented to the filing of this brief.

STATEMENT OF THE CASE

Amicus curiae is, in the interest of brevity, omitting any detailed statement of the facts of this case. *Amicus* adopts by reference the statement of facts contained in Petitioner's brief.

Briefly, Petitioner TXO Production Corp. ("TXO") obtained and filed a quitclaim deed to certain property with respect to which TXO had an oil and gas exploration and production agreement with Respondent Alliance Resources Corporation ("Alliance"). Based on an assertion of rights under the quitclaim deed, TXO then filed an action to quiet title. Alliance counterclaimed, alleging that its right to the oil and gas estate in the property in question was unambiguous and that TXO's recording of the quitclaim deed constituted slander of title.

The trial court in the quiet title action ruled that TXO had no title to the property on the basis of the quitclaim deed it had obtained. On the counterclaim for slander of title, the jury awarded Alliance $19,000 in compensatory damages, consisting solely of the attorney's fees Alliance had incurred in the quiet title action. The jury awarded $10 million in punitive damages against TXO.

The West Virginia Supreme Court, in an opinion by Justice Neely, upheld the punitive damages award, rejecting TXO's due process challenge. Of particular relevance to this brief is the court's reasoning that (1) it

was within the trial judge's "sound discretion" to allow the jury to consider financial information concerning the worth of TXO's separately incorporated parent in determining the appropriate amount of punitive damages; (2) the appropriate ratio to consider for reviewing excessiveness of the punitive damages award was the ratio of $10 million in punitive damages to $19,000 in compensatory damages, the compensatory damages consisting entirely of attorney's fees; and (3) the punitive damages award was justified in part because the "type" of fraudulent activity undertaken by TXO "could potentially cause millions of dollars in damages to other victims." Pet. App. 40A.

SUMMARY OF ARGUMENT

This case illustrates the consequences of essentially standardless punitive damages determinations. A punitive award, by definition a punishment, has been meted out without safeguards of objective rationale or maximum amount to constrain the discretion of a juror or a judge who is out to do justice according to his or her own personal code. The author of the opinion below has been quite candid in another forum about the personal standards he brings to cases such as this:

> As long as I am allowed to redistribute wealth from out-of-state companies to injured in-state plaintiffs, I shall continue to do so. Not only is my sleep enhanced when I give someone else's money away, but so is my job security, because the in-state plaintiffs, their families, and their friends will reelect me.

Richard Neely, *The Product Liability Mess: How Business Can Be Rescued From the Politics of State Courts* 4 (1988).

The Due Process Clause of the Constitution cannot prevent injustice, but it does require that before a defendant may be deprived of property he must have an opportunity for an adjudication that is something other

than a sham. As a member of this Court has written: "As laws have become more numerous, and as people have become increasingly ready to punish their adversaries in the courts, we can less and less afford protracted uncertainty regarding what the law may mean." Scalia, *The Rule Of Law As A Law Of Rules*, 56 U.Chi.L.Rev. 1175, 1179 (1989). While the Due Process Clause does not enforce strict adherence to this ideal of certainty, it does require adjudication according to articulated principles that are sufficiently clear to avoid "*ad hoc* and subjective decisionmaking. *Grayned v. City of Rockford*, 408 U.S. 104, 109 (1972). As Justice Scalia has written: "Statutes that are seen as establishing rules of inadequate clarity or precision are criticized, on that account, as undemocratic -- and, in the extreme, unconstitutional -- because they leave too much to be decided by persons other than the people's representatives." Scalia, *supra* at 1176. In this case the punitive damages award similarly left "too much to be decided" by the jury and reviewing court, and thus was more a product of whim than of objective and clear rules.

This *amicus* brief focuses on three aspects of this extreme case. First, the trial court and the West Virginia Supreme Court impermissibly allowed consideration of the wealth of TXO's separately incorporated, non-party parent arbitrarily and without otherwise applicable procedural protections. Notwithstanding the state's well developed policies respecting the corporate form, the court below gave no guidance as to the circumstances under which corporate formalities will be ignored so that evidence of a parent corporation's wealth is considered in awarding punitive damages.

Second, West Virginia law, like that of many states, recognizes that a punitive damages award is intended to provide additional compensation to the injured victim and to reflect actual harm done. The court below nonetheless refused to recognize that, under these criteria, the attorney's fees award in this case *reduced* the need for a punitive damages award. The West Virginia Supreme Court's "excessiveness" calculus thus was *ad hoc* and subjective in light of the state's criteria for determining

punitive damages, because it failed to lower the punitive-to-compensatory damages ratio in recognition of the separate attorney's fees award.

Third, the West Virginia Supreme Court used an utterly standardless inquiry into the potential harm that the "type" of conduct engaged in by TXO might cause, allowing speculation about conduct that has not yet occurred and the harm such conduct (by TXO or others) could cause an indeterminate number of victims. The court below referred to no evidence on this point; indeed the jury instruction itself did not allow consideration of likely harm from the conduct engaged in by TXO, let alone potential or conjectural harm from hypothetical future conduct by TXO or others.

The analysis of these three aspects of the West Virginia Supreme Court's $10 million punitive damages award suggests several neutral principles (to be used with others) to assist state courts in achieving adherence to meaningful, articulated standards in the award of punitive damages consistent with the Due Process Clause. First, a court's punitive damages calculus must not be arbitrary or capricious when considered in light of the whole body of relevant state law. Second, a court's procedures for calculating punitive damages and determining excessiveness must be consistent with the state's purposes in awarding punitive damages. And third, no factor which a state considers in determining punitive damages may call for or permit rank speculation by the jury or court.

ARGUMENT

I. WEST VIRGINIA'S PROCEDURES FOR IMPOSING PUNITIVE DAMAGES UPON CORPORATE ENTITIES ARE ARBITRARY AND FUNDAMENTALLY UNFAIR

Before the courts of West Virginia may issue a judgment depriving a party of property, they must afford the party all protections to which it is entitled under the

Due Process Clause of the Fourteenth Amendment.[1] *Hurtado v. State of California*, 110 U.S. 516, 537 (1884). ("[A]ny legal proceeding enforced by public authority... must be held to be due process of the law"). "The Due Process Clause . . . was 'intended to secure the individual from the arbitrary exercise of the powers of government.'" *Daniels v. Williams*, 474 U.S. 327, 332 (1986) (citations omitted). "By requiring the government to follow appropriate procedures when its agents decide to 'deprive any person of life, liberty, or property,' the Due Process Clause promotes fairness in such decisions." *Id.* As illustrated below and in the Petitioner's brief, West Virginia's system for imposing punitive damages against a corporation lacks the constitutionally required procedural protections that ensure fairness in decision making.

Fundamental fairness demands that procedural protections be in place prior to permitting a jury to consider evidence of a non-party corporation's wealth as part of its punitive damages calculation.[2] The West Virginia trial court below determined that in awarding punitive damages, the jury could properly consider the wealth of corporations that were not parties to the action, namely, TXO's parent corporations, USX and the TXO Division. The trial court's determination was not the result of reasoned application of West Virginia's corporations law or evidentiary law. Rather, the trial court's decision to permit the jury to consider the wealth of TXO's parent corporations, and the West Virginia Supreme Court's affirmation of this decision, was arbitrarily made, denying TXO and its parents the constitutional protections of the Due Process Clause.

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[1] The Due Process Clause of the Fourteenth Amendment provides:

> [N]or shall any state deprive any person of life, liberty or property without due process of law.

[2] Petitioner argues that the wealth of the defendant is an improper basis for a punitive damages award. We agree. This discussion focuses on the even more arbitrary consideration of a non-party parent corporation's wealth.

The imposition of punitive damages without adequate procedural protections is not the only constitutional problem with the punitive damages award at issue here. Because it was based on irrelevant evidence of a non-party's wealth, the punitive damages award against TXO was excessive and not rationally related to West Virginia's stated goals of punishment and deterrence. The purpose of the Due Process Clause is "to exclude everything arbitrary and capricious in litigation affecting the rights of citizens." *Dent v. West Virginia*, 129 U.S. 114, 124 (1889). Criteria for determining penalties may not be so defined as to allow arbitrary and discriminatory enforcement. *See Grayned v. City of Rockford*, 408 U.S. 104, 108 (1972). The West Virginia Supreme Court's consideration of evidence of a non-party's wealth was arbitrary and impermissibly *ad hoc*, particularly when considered in light of the body of substantive law governing West Virginia's treatment of corporations. Accordingly, the punitive damages award against TXO transgresses fundamental principles of due process.

A. Permitting The Jury To Consider The Wealth Of TXO's Parent Corporations Without Any Finding That TXO's Parents Should Be Responsible Violated TXO's Due Process Rights

In order to afford a party its constitutional due process protections, the procedures used to award punitive damages must be reasonable. *Haslip v. Pacific Mutual*, 111 S. Ct. 1032, 1043 (1991). The jury must receive adequate guidance from the trial court so that jury discretion is not unlimited. *Id.* ("As long as [jury] discretion is exercised within reasonable constraints, due process is satisfied"). A state's procedural protections -- including trial court and appellate review -- should make certain "that punitive damages are reasonable in their amount and rational in light of their purpose to punish what has occurred and to deter its repetition." *Id.* at 1044-45.

West Virginia's system for awarding punitive damages permits juries to consider evidence of a defendant's wealth. *Garnes v. Fleming Landfill, Inc.*, 413 S.E.2d 897, 908 (W. Va. 1991). However, by failing to require a specific factual finding as to the corporate entity whose wealth is to be measured, West Virginia's system for determining punitive damages lacks the objective and meaningful criteria necessary to satisfy the Due Process Clause.

1. West Virginia Law Specifies That The Corporate Entity Cannot Be Disregarded Haphazardly

"The law presumes that two separately incorporated businesses are separate entities and that corporations are separate from their shareholders." *Southern Electrical Supply Co. v. Raleigh County National Bank*, 320 S.E.2d 515, 523 (W.Va. 1984). "In this jurisdiction [West Virginia], the rule is well established that the corporate entity cannot be disregarded haphazardly." *Atwater & Co., Inc. v. Fall River Pocahontas Collieries Co.*, 195 S.E. 99, 105 (W. Va. 1938). "Time and time again, courts have held that a corporation is an entity distinct from its stockholders. Equally, it is a general rule that the fact that the majority of stock of one corporation is owned by another corporation does not make the former the instrumentality of the latter." *Id.* at 104.[3]

Accordingly, West Virginia and most other jurisdictions[4] recognize the importance of observing the

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[3] Both the West Virginia Constitution and the West Virginia Corporation Act affirm the limited liability principle for corporations and their shareholders. West Virginia Constitution, Article XI, § 1; West Virginia Corporation Act, § 31-1-89.

[4] *See, e.g., Schenley Distillers Corporation v. United States*, 326 U.S. 432, 437 (1946); *Ministry of Defense of the Islamic Republic of Iran v. Gould, Inc.*, 969 F.2d 764, 769-70 (9th Cir. 1992) (applying federal 'common law' and California law); *Poulos v. Naas Foods*, (continued...)

distinctions between corporate entities, and have fashioned certain procedural tests to ensure that the corporate form is never disregarded haphazardly. A party seeking to hold a parent liable for the acts of its subsidiary must submit sufficient evidence to overcome the presumption that the parent and subsidiary have separate, independent entities, subject to the protections and advantages of the corporate form, such as limited liability. *Southern Electrical Supply Co.*, 320 S.E.2d at 524; *Southern States Cooperative, Inc. v. Dalley*, 280 S.E.2d 821, 827 (W.Va. 1981)(advantages of corporate form include "the limitation of personal liability, the continuity of corporate existence, and the facilitation of business administration"); 1 William M. Fletcher, Cyclopedia of the Law of Private Corporations, § 25 (perm. ed. rev. vol. 1990) (hereinafter "Fletcher") ("A 'subsidiary corporation' is one which is controlled by another corporation by reason of the latter's ownership of at least a majority of the shares of the capital stock. Notwithstanding the fact that the two corporations may be so related, each is deemed to have an independent existence").

West Virginia, like other jurisdictions,[5] does recognize that under certain exceptional circumstances the corporate form may be disregarded in order to avoid an unjust result. *Laya v. Erin Homes, Inc.*, 352 S.E.2d 93, 97 (W. Va. 1986). The decision to hold one corporation responsible for the acts of the other involves "complicated factual proofs" and the test for making such a decision

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[4] (...continued)
Inc., 959 F.2d 69, 73-74 (7th Cir. 1992) (applying Wisconsin law); *Key v. Liquid Energy Corp.*, 906 F.2d 500, 503 (10th Cir. 1990) (applying Oklahoma law); *Tennessee Valley Authority v. Exxon Nuclear Co.*, 753 F.2d 493, 497-98 (6th Cir. 1985) (applying Tennessee law).

[5] *See, e.g., Schenley Distillers Corporation*, 326 U.S. at 437; *Ministry of Defense of the Islamic Republic of Iran*, 969 F.2d at 769-70; *Poulos*, 959 F.2d at 73-74; *Key*, 906 F.2d at 503; *Tennessee Valley Authority*, 753 F.2d at 497-98.

should be "applied gingerly." *Southern Electrical Supply Co.*, 320 S.E.2d at 517 n.5, 521.[6]

The party seeking to hold one corporation liable for the acts of another must show "that the corporation is so organized and controlled to be a mere adjunct or instrumentality of the other." *Id.* at 522 (citations omitted). In order to make this stringent showing, a party must present evidence to the court of numerous relevant factors such as inadequate capitalization, commingling of funds, and failure to maintain corporate formalities.[7] No one factor is determinative -- prior to a determination to disregard the corporate form, a court must examine all of these numerous factors in a totality of the circumstances test. *Laya*, 352 S.E.2d at 99.[8] "The mere showing that

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[6] The "instrumentality" rule, which is considered one of the alter ego doctrines, is employed to hold one corporation liable for the acts of another corporation that is within its total control. *Southern Electrical Supply Co.*, 320 S.E.2d at 521 n.9 (citing Fletcher, §§ 41.10, 43.10 (Perm. Ed. 1983 Rev.)). "The alter ego doctrines, alternatively 'instrumentality', 'identity,' 'agency,' 'piercing the corporate veil,' or 'disregarding the corporate fiction,' are designed to prevent injustice when the corporate form is interposed to perpetuate an intentional wrong, fraud or illegality." *Southern Electrical Supply Co.*, 320 S.E.2d at 521-522.

[7] In more detail these factors include: (1) inadequacy of capital structures; (2) whether corporate funds have been commingled; (3) whether corporate formalities have been followed; (4) whether funds from one corporation have been siphoned off to the other without regard to the harm caused either entity; (5) whether separate records have been maintained; (6) whether there has been total control and dominance of one corporation by another; (7) whether one corporation is a 'dummy corporation' with no business activity or purpose; (8) whether there has been a violation of law or public policy; (9) whether unity of interest and ownership causes one entity to be indistinguishable from another; and (10) whether the corporations share common shareholders, officers, employees and facilities. *Id. Laya*, 352 S.E.2d at 98-102; *Southern Electrical Supply Co.*, 320 S.E.2d at 523.

[8] This inquiry is so intensely factual, that it should "rarely be determined upon a motion for summary judgment." *Laya*, 352 S.E.2d at 102.

one corporation is owned by another or that they share common officers is not a sufficient justification for a court to disregard their separate corporate structure." *Southern States Cooperative, Inc.*, 280 S.E. 2d at 827; *Atwater & Co., Inc.*, 195 S.E. at 104. Indeed, in determining the application of the instrumentality rule, "the test is the *exercise* of control by the parent company over the subsidiary company, and not the mere *opportunity* to exercise control." *Id.* (emphasis added).

Moreover, the West Virginia Supreme Court has instructed that the 'instrumentality rule' should be used both sparingly and carefully: "Courts should invoke the rule only with mature consideration and caution. Undue haste in the application of the rule to every case involving corporations would break down the entire corporation law of the country and would bring disastrous results." *Atwater & Co., Inc.*, 195 S.E. at 104. Fletcher's Cyclopedia Corporations agrees: "The importance of observing these [corporate] distinctions is great and pervades the whole law of corporations, being fundamental in many other rules of law." Fletcher, § 25. "Limited liability is the rule not the exception; and on that assumption large undertakings are rested, vast enterprises are launched, and huge sums of capital attracted." *Anderson v. Abbott*, 321 U.S. 349, 362-63 (1944).[9]

2. *Despite The Stringent Test Established By West Virginia Law, The Courts Below Permitted The Jury To Disregard Corporate Forms Without Any Factual Findings Whatsoever In Violation Of Due Process*

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[9] *See also Johnson v. Flowers Industries, Inc.*, 814 F.2d 978, 980 (4th Cir. 1987) ("Business decisions proceed on the assumption of limited liability: courts foster stability in commerce by upholding the legitimate assumptions underlying business activity, not by overturning them"). As Chief Judge Cardozo cautioned in *Berkey v. Third Ave. Ry. Co.*, 155 N.E. 58, 61 (N.Y. Ct. App. 1926), when courts ignore the separation between subsidiary and parent and treat the two as one, "we thwart the public policy of the state instead of defending or upholding it."

The trial court permitted the jury to consider evidence, over TXO's objection, of TXO's parent corporations' wealth. More specifically, the trial court admitted the testimony of an expert who testified as to the wealth of the TXO Division of USX based upon a review of USX's annual report. USX's annual report identified the TXO Division of USX as being comprised of at least fifteen corporate entities other than TXO Production Corp., the named party in this litigation. Pet. App. 41A. Yet Alliance never argued or attempted to prove that USX or the TXO Division was ultimately responsible for the acts of TXO under the 'instrumentality rule' or any other alter ego doctrine. Indeed USX was not even the parent of TXO at the time of the events on which the punitive damages award is based. Pet. App. 40A-41A, n. 13. Alliance never argued that evidence of USX's or the TXO Division's wealth was relevant to the proceeding. The trial court never made any such findings. Rather, the trial court admitted this irrelevant and prejudicial evidence over TXO's objection, without reference to West Virginia law, which recognizes and maintains the limitations of the corporate form absent a showing of certain exceptional circumstances.[10]

The West Virginia Supreme Court upheld the trial court's decision to admit evidence of USX's and the TXO Division's wealth despite the fact that the trial court failed to make the determination that TXO was the 'alter ego' or

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[10] As a purported justification for presenting the evidence of USX's and the TXO Division's wealth, Alliance represented to the trial court that TXO had failed to disclose the net worth of TXO Production Corp. in answers to interrogatories. However, whether the interrogatories identified by Respondents called for such information is questionable, and in any event, Alliance never moved to compel a response to these interrogatories. The West Virginia Supreme Court notes that "TXO was not forthcoming during discovery" but makes no finding that it was appropriate to permit the jury to consider the wealth of a non-party corporation as a discovery sanction. Pet. App. 41A. The West Virginia Supreme Court's basis for considering the evidence is that "[t]he worth of the TXO Division of USX, and the worth of USX for that matter, is relevant." *Id.*

'instrumentality' of its non-party parents in accordance with West Virginia law. *Id.* The court held that the worth of the parents was relevant to the award of punitive damages against TXO, arguing that:

> If we did not allow trial judges in their sound discretion to admit evidence of the worth of parent corporations, corporations could escape liability simply by incorporating separate departments as a member of undercapitalized subsidiaries. It is the management of USX that must ultimately make the decision that its employees will not engage in malicious and nefarious business activities, and, therefore, it is the pocketbook of USX that the jury must reach.

Id. Apparently forgetting that West Virginia had established an entire body of law to accommodate the corporation's interest in maintaining its form, and the public's interest in preventing the corporate form from being used to perpetrate injustice, the court below rationalized the decision to permit evidence of a non-party parent's wealth by stating that it was necessary to prevent the ability of a parent corporation to escape liability. *Id.*

The West Virginia Supreme Court's 'rationale' is absurd. Neither USX nor TXO Division were named parties to this litigation. Alliance never argued that USX or the TXO Division should be responsible for its subsidiary's acts, or in the court's words, that it was "the pocketbook of USX that the jury verdict must reach." *Id.* Accordingly, the determination to disregard TXO's corporate form to reach its parent corporations was never made, despite the fact that the West Virginia Supreme Court has affirmed and reaffirmed this determination as necessary prior to disregarding the corporate form. *Laya*, 352 S.E.2d at 97; *Southern Electrical Supply Co.*, 320 S.E.2d at 521-23; *Southern States Cooperative, Inc.*, 280 S.E.2d at 827; *Atwater & Co., Inc.*, 195 S.E.2d at 104-05. Instead, the West Virginia Supreme Court dispensed with decades of law and established procedural protections,

and affirmed the trial court's determination to admit irrelevant evidence of a non-party's wealth.[11]

In *Haslip*, the Court upheld Alabama's method for addressing punitive damages as constitutional because, *inter alia*, the jury instructions accommodated the defendant's interest in rational decision making, and Alabama's interest in the meaningful assessment of appropriate deterrence and retribution. *Haslip*, 111 S. Ct. at 1044. In addition, the jury's discretion was not unlimited, and confined to deterrence and retribution, the state policy concerns sought to be advanced. *Id.* And, as a matter of assessing the constitutionality of such discretion, the Court stated that "[a]s long as the discretion is exercised within reasonable constraints, due process is satisfied." *Id.*

In affirming the constitutionality of Alabama's system, the Court also looked to "meaningful and adequate review by the trial court," and appellate review of the Alabama Supreme Court as "an additional check on the jury's or trial court's discretion." *Id.* at 1044-45. Appellate review makes certain that "punitive damages are reasonable in their amount and rational in light of their purpose to punish what has occurred and to deter its repetition. *Id.* at 1045.

Here, however, the trial court's review and the West Virginia Supreme Court appellate review failed to provide

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[11] Perhaps recognizing that its nonchalant affirmation of the trial court's admission of this evidence directly contradicted its own established case law, the West Virginia Supreme Court, in a footnote, attempted its own cursory review of some of the factors relevant to an 'instrumentality' or 'alter ego' finding. Pet. App. 42A. This belated and insufficient review does not even begin to satisfy the rigorous test established and reaffirmed by the West Virginia Supreme Court in *Atwater & Co., Inc.*, *Southern States Cooperative, Inc.*, *Southern Electrical Supply Co.*, and *Laya*. There was no evidence presented to the trial court upon which to make any such decision. And even if the court did base its analysis on proper evidence, its review was superficial -- while "finding" that USX had the *power* to generally control the operations of TXO, it failed to address the critical factor of whether USX or the TXO Division *did* exercise control. *Atwater & Co., Inc.*, 195 S.E. at 104.

the constitutionally required "check" on the jury's and trial court's discretion. The trial court permitted the jury to consider evidence that was not rationally related to West Virginia's goals of retribution and deterrence. *See Garnes*, 413 S.E.2d at 909. In considering this evidence, the jury was permitted to punish TXO's non-party parents without any finding that TXO's parent entities should be responsible for the acts of TXO. *See Ramada Hotel Operating Company v. Shaffer*, 576 N.E.2d 1264, 1267 (Ind. Ct. App. 1991) (in admitting evidence of parent corporation's wealth without any evidence to support an alter ego or instrumentality finding, plaintiff was allowed to *punish* the parent for the wrongdoing of the subsidiary). The jury's ability to achieve such a result cannot be considered the product of "definite and meaningful constraint." *Haslip*, 111 S. Ct. at 1045.

In *Garnes*, the West Virginia Supreme Court expressly held that the financial position of the *defendant* is relevant in determining punitive damage awards. 413 S.E.2d at 909. According to West Virginia law, the wealth of the defendant is relevant to the deterrence function of punitive damages -- evidence of the defendant's wealth permits the jury to assess the proper amount necessary to discourage future bad acts. *Leach v. Biscayne Oil and Gas Co., Inc.*, 289 S.E.2d 197, 199 (W. Va. 1982). *See also Garnes*, 413 S.E.2d at 909; *Wells v. Smith*, 297 S.E.2d 872, 879 (W. Va. 1982). However, in considering evidence of the non-party parents' wealth, the fact-finder's discretion was not confined to the state policy concerns sought to be advanced, as mandated by *Haslip*. 111 S. Ct. at 1044. Simply stated, the financial position of a non-party was considered without any showing that such information would be relevant -- i.e., that the non-party should be responsible for the acts of the defendant.

What makes the trial court's failure to follow established corporate and evidentiary law even more egregious is that rather than providing an additional check on the jury's and on the trial court's discretion, the West Virginia Supreme Court affirmed the award, itself ignoring its own stated laws and policies. No procedure on appeal checked whether the trial court's admission of the evidence

was consistent with the purposes of punitive damages. The West Virginia Supreme Court set forth no general principle to guide whether evidence of a non-party parent corporation's wealth should be admissible. The appellate court left that determination to the "sound discretion" of trial judges. Here there was no "additional check on the jury's or trial court's discretion" whatsoever. *Haslip*, 111 S.Ct. at 1045. This utter lack of procedural protection renders the lower court's consideration of evidence of TXO's parent's wealth unconstitutional.

3. *Other Jurisdictions Recognize The Fundamental Unfairness of Permitting A Jury To Consider Evidence Of A Non-Party Parent's Wealth*

A number of state and federal courts have recognized the fundamental principle that "where a plaintiff seeks punitive damages against a subsidiary corporation, evidence of the wealth of the parent corporation is irrelevant and inadmissible unless the plaintiff can prove that the corporate veil should be pierced because the subsidiary was but the alter ego or mere instrument of the parent." Fletcher, § 43 (perm. ed. Supp. 1992). Numerous appellate courts have overturned or remitted punitive damages awards that were based on evidence of a non-party's wealth, holding that the jury's verdict was based on prejudicial and irrelevant evidence.[12]

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[12] *E.g.*, *Herman v. Hess Oil Virgin Islands Corporation*, 379 F. Supp. 1268, 1276 (D. St. Croix 1974), *aff'd*, 524 F.2d 767 (3d Cir. 1973), (size of parent company not relevant when assessing damages against the subsidiary); *HCA Health Services of Midwest, Inc. v. National Bank of Commerce*, 745 S.W.2d 120, 124 (Ark. 1988) (because subsidiary was sole party-defendant, and no reason was shown why their separate identifies should be disregarded, trial court erred in permitting appellees to refer to parent in quest for punitive damages); *Walker v. Dominick's Finer Foods, Inc.*, 415 N.E.2d 1213, 1216 (Ill. Ct. App. 1980) (nothing in record to warrant the admission of the financial figures of a non-party parent into evidence); *Cap Gemini America, Inc. v. Judd*, 597 N.E.2d 1272, 1286 (Ind. Ct. App. 1992) (continued...)

Permitting a jury to consider irrelevant and prejudicial evidence in awarding punitive damages is fundamentally unfair and constitutes a violation of a party's due process rights. *See Dowling v. United States*, 110 S. Ct. 668, 674 (1990) (recognizing that the admission of evidence may be so "extremely unfair that its admission violates fundamental conceptions of justice") (quotations omitted; citations omitted). The jury's consideration of irrelevant evidence of TXO's parents' wealth irreparably tainted the punitive damages award against TXO, such that the award jars "one's constitutional sensibilities." *Haslip*, 111 S. Ct. at 1043. In *Haslip*, the Court recognized that the imposition of punitive damages could violate the Constitution. *Id.* at 1043. Here, the imposition of punitive damages based upon the wealth of TXO's non-party parents without any determination that such evidence was in any way relevant to the proceedings -- was unconstitutional and cannot be permitted to stand.

The current practice of the states serves as a concrete indicator of what fundamental fairness and rationality require. *See Schad v. Arizona*, 111 S. Ct. 2491, 2500-01 (1991) (plurality opinion) (Court looked to history and current practice of states in order to determine adequacy of procedure at issue); *Hurtado*, 110 U.S. at 534. ("Due process of law is process according to the law of the land.

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[12] (...continued)
(evidence of wealth of parent is irrelevant and inadmissible in assessing punitive damages against a subsidiary where no finding that subsidiary was an alter ego or mere instrument of the parent); *Miller Brewing Company v. Best Beers of Bloomington, Inc.*, 579 N.E.2d 626, 641-43 (Ind. Ct. App. 1991) (same). *Ramada Hotel Operating Company*, 576 N.E.2d at 1267-71 (unknown and undetermined financial connection between parent and subsidiary fails to advance state purposes of punitive damage award); *Liberty Financial Management Corporation v. Beneficial Data Processing*, 670 S.W.2d 40, 51-2 (Mo. Ct. App. 1984) (trial court erred in admitting into evidence the financial statement of defendant's parent corporation). *See also A.L. Laboratories, Inc. v. Philips Roxane*, 803 F. 2d 378, 385-86 (8th Cir. 1986), *cert. denied*, 107 S. Ct. 1632 (evidence not sufficient to support award of punitive damages against parent on theory that parent should be held responsible for the acts of the subsidiary).

This process in the States is regulated by the law of the State"). West Virginia's own laws commanded that prior to permitting a jury to consider the wealth of a corporation's non-party parents, the trial court make a factual determination as to whether the subsidiary should be considered the alter ego or instrumentality of the parent. *Laya*, 352 S.E.2d at 97; *Southern Electrical Supply Co.*, 320 S.E.2d at 521-23; *Southern States Cooperative, Inc.*, 280 S.E.2d at 827; *Atwater & Co., Inc.*, 195 S.E.2d at 104-05. Without such a procedural protection, the jury's options in awarding punitive damages against TXO fell "beyond the constitutional bounds of fundamental fairness and rationality." *Schad*, 111 S. Ct. at 2504 (plurality opinion).

B. West Virginia's Practice Of Permitting Juries To Consider Evidence Of A Non-Party's Wealth Is Arbitrary And Subjective In Light Of The State's Policies With Respect To The Corporate Form

The West Virginia Supreme Court provided no standards for determining when a defendant's corporate form will be ignored and evidence of its parent's wealth admitted for a jury's consideration in determining punitive damages. As discussed above, the court left that determination to the trial judge's "sound discretion." Pet. App. 41A. The court below mentioned the possibility that a corporate defendant *could* be one of "a number of undercapitalized subsidiaries," but required no showing that that was in fact the case. *Id.* at 41A-42A. The court was convinced that "at the end of the chain of related companies, TXO has but one stockholder," but it provided no reason for departing from the "general rule that the fact that a majority of the stock of one corporation is owned by another corporation does not make the former the instrumentality of the latter." *Atwater*, 195 S.E. at 104-105.

Thus West Virginia has provided no means for determining when the corporate form will be respected and

when it will be ignored in a punitive damages proceeding. Such standardless review violates principles of due process.

> The requirement that government articulate its aims with a reasonable degree of clarity ensures that state power will be exercised only on behalf of policies reflecting an authoritative choice among competing social values, reduces the danger of caprice and discrimination in the administration of the laws, enables individuals to conform their conduct to the requirements of law, and permits meaningful judicial review.

Roberts v. United States Jaycees, 468 U.S. 609, 629 (1984).[13] None of the goals of due process articulated in *United States Jaycees* is satisfied by the West Virginia Supreme Court's decision in this case. The opinion of the court below cannot be reconciled with the policies respecting the corporate form that pervade other state decisional law. No "choice among competing social values" can be discerned. More importantly, the lower court's decision invites "caprice and discrimination" in the

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[13] In a closing footnote, the *Haslip* Court states that a "void-for-vagueness" analysis "is not helpful" because "[d]ecisions about the appropriate consequences of violating a law are significantly different from decisions as to whether a violation has occurred." 111 S.Ct. at 1046 n. 12. This Court in other cases has used a "void-for-vagueness" analysis to examine laws concerning imposition of penalties as such.

> [V]ague sentencing provisions may post constitutional questions if they do not state with sufficient clarity the consequences of violating a given criminal statute.

United States v. Batchelder, 442 U.S. 114, 123 (1979). In any event, the principles articulated in cases such as *United States Jaycees* define the requirements of due process generally, and provide guidance beyond the confines of a strict "void-for-vagueness" approach

determination of punitive damages. "[L]aws must provide explicit standards for those who apply them" to avoid "resolution on an *ad hoc* and subjective basis. . . ." *Grayned*, 408 U.S. at 108-109.[14] And, as discussed above, the opinion of the court below provides no guidelines for "meaningful judicial review."

The Due Process Clause is meant "to exclude everything arbitrary and capricious in litigation affecting the rights of citizens." *Dent*, 129 U.S. at 123 (1889). Against the backdrop of decades of developed state law respecting the corporate form, the West Virginia Supreme Court's decision in this case is an *ad hoc*, arbitrary and subjective determination to depart from that law. The decision gives no guidance to prospective defendants, juries or trial courts as to when a parent corporation's wealth will be considered in future punitive damages determinations. The decision is fundamentally unfair to TXO and its non-party parent and does not meet minimal due process requirements.

II. WEST VIRGINIA'S PROCEDURES FOR CALCULATING A RATIO OF PUNITIVE TO COMPENSATORY DAMAGES WHEN ATTORNEY'S FEES HAVE BEEN AWARDED ARE ARBITRARY AND CAPRICIOUS IN LIGHT OF WEST VIRGINIA'S PURPOSES FOR AWARDING PUNITIVE DAMAGES

As discussed above, a state's procedures for determining a punitive damages award must assure "that

[14] Although *Grayned* involved a criminal statute, these same principles apply in the context of civil penalties. A "state Act whether labeled 'penal' or not must meet the challenge that it is unconstitutionally vague." *Giaccio v. State of Pennsylvania*, 382 U.S. 399, 402 (1966). Although greater scrutiny may be appropriate depending on the severity of the penalty, *Village of Hoffman Estates v. Flipside, Hoffman Estates, Inc.*, 455 U.S. 489, 498-499 (1982), punitive damages, as their name implies, are intended to, and do, serve to punish. *See Gertz v. Robert Welch, Inc.*, 418 U.S. 323, 350 (1974).

punitive damages are reasonable in their amount and *rational in light of their purpose* to punish what has occurred and to deter its repetition." *Haslip*, 111 S. Ct. at 1044-45 (emphasis added). But the West Virginia Supreme Court's consideration in this case of the appropriate ratio of $10 million in punitive damages to $19,000 in compensatory damages was arbitrary and irrational in light of West Virginia's articulated purposes for awarding punitive damages. Compensatory damages in this case consisted exclusively of attorney's fees awarded to Alliance. Yet no procedure provided any means for rationally relating the size of the punitive damages award to compensatory damages when a plaintiff already has been awarded the litigation expenses incurred in vindicating his rights.

The West Virginia Supreme Court calculated the ratio of punitive to compensatory damages without reducing the ratio in light of the fact that compensatory damages included attorney's fees. In doing so, it acted contrary to West Virginia's own articulated criteria for calculating punitive damages. Where (as in West Virginia) a purpose of awarding punitive damages is to provide additional compensation to an injured victim, or where (as in West Virginia) the award is required to be proportional to the actual harm done to the victim, a ratio of punitive to compensatory damages must be *lower* where the compensatory damages includes attorney's fees.

A simple example illustrates this principle. Suppose in a tort action, case 1, the plaintiff is awarded $10,000 in actual damages and the court finds that a ratio of punitive to actual damages of two-to-one is appropriate, awarding $20,000 in punitive damages. In a similar tort action, case 2, the plaintiff is awarded the same $10,000 in actual damages plus an additional $20,000 in attorney's fees. Assuming all else to be equal (the defendants' conduct, wealth, etc.), the plaintiff in the second case surely is *not* entitled to a $60,000 punitive damages award based on a two-to-one ratio of punitive damages to actual damages plus attorney's fees.

The reason for considering the ratio of punitive to actual damages in West Virginia as in most other states is

to provide some measure of proportionality between the punitive award and the harm done to the plaintiff. In the hypothetical example, the harm is not greater in the second case than in the first. To the contrary, in the second case the attorney's fees award makes the victim whole for the cost of vindicating his rights even before the punitive damages award. If anything, case 2 justifies a *lesser* punitive damages award than case 1. The West Virginia Supreme Court's consideration of the punitive to compensatory damages ratio here, entirely divorced from and in conflict with the purposes of a punitive damages award, violated due process.

A. TXO Was Deprived Of A Procedure That Rationally Related The Award Of Attorney's Fees To The Size Of The Punitive Damages Award.

In this case, the only compensatory damages awarded to the plaintiff consisted of a relatively modest $19,000 in attorney's fees -- the cost of Alliance's defense of TXO's quiet title action. Pet. App. 20A. The West Virginia Supreme Court in no way took account of the fact that compensatory damages consisted entirely of attorney's fees in considering the appropriate ratio of punitive to compensatory damages. The trial court's verdict means that Alliance suffered *no* compensable harm other than the need to defend title to its property. The attorney's fees award itself compensated Alliance for the cost of vindicating its rights. The court considered a ratio of punitive to compensatory damages (the compensatory damages consisting entirely of attorney's fees), taking no account whatever of the state's criteria for awarding punitive damages.

In West Virginia one rationale for the award of punitive damages is to provide additional compensation to the plaintiff for the trouble and cost of the lawsuit. For example, in *Garnes*, 413 S.E.2d at 909, the Supreme Court of West Virginia held that when a trial court reviews a jury's punitive damages award it should consider, among other factors: "The costs of litigation.

(We want to encourage plaintiffs to bring wrong-doers to trial.)" See also *Wells v. Smith*, 297 S.E.2d 872, 879 (W. Va. 1982) ("a proper consideration in the assessment of [punitive] damages is the annoyance and inconvenience to the plaintiff caused by the defendant's wrongful conduct," citing *Jarrett v. E.L. Harper & Son, Inc.*, 235 S.E.2d 362 (W. Va. 1977)). Many other states also define compensation of the victim for the costs of litigation as one purpose of punitive damages awards.[15]

West Virginia law also considers the extent of the harm inflicted on the plaintiff in determining the appropriate amount of punitive damages. *Garnes*, 413 S.Ed.2d at 908 (punitive damages should bear a reasonable relationship to the harm that has actually occurred); *Wells*, 297 S.E.2d at 878 (in assessing punitive damages trier of fact should consider, *inter alia*, the extent of harm inflicted).[16] Again, many other jurisdictions also look to the extent of the harm inflicted as a central factor in the punitive damages calculation.[17]

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[15] *See, e.g., Bankers Life and Casualty Co. v. Crenshaw*, 483 So.2d 254, 278 (Miss. 1985) (under Mississippi law one purpose of punitive damages is rewarding the injured party for bringing suit); *Hofer v. Lavender*, 679 S.W.2d 470, 474 (Tex. Civ. App. 1984) (punitive damages intended to compensate plaintiff for inconvenience and attorney's fees); 30 ALR 3d 1443, 1448-1453; *see also* Restatement (Second) Torts § 908, comment e (1977) (fact that plaintiff has been put to trouble and expense in protecting his interests may be considered in determining amount of punitive damages). *Cf., Berry v. Loiseau*, 614 A.2d 414, 437 (Conn. 1992) (common law punitive damages awards are *limited* to a party's litigation costs).

[16] West Virginia law also considers the harm that is likely to occur from the defendant's conduct. This issue is discussed *infra* in section III.

[17] *See, e.g., Las Palmas Associates v. Las Palmas Center Associates*, 235 Cal.App.3d 1220, 1257, 1 Cal.Rptr.2d 301, 323 (1991) (punitive damages must bear a reasonable relation to the injury, harm or damage actually suffered); *Johnson v. Hugo's Skateway*, 949 F.2d 1338, 1351 (4th Cir. 1991) (applying Virginia law and requiring consideration of harm that did result from defendant's conduct). *See*

(continued...)

No procedure on appeal checked whether the jury's award was consistent with the state's purposes for awarding punitive damages or its articulated criteria for determining the amount of an award. The West Virginia Supreme Court considered whether the award was "excessive" by considering the ratio of punitive to compensatory damages, the compensatory damages consisting entirely of attorney's fees. Where compensatory damages consist solely or partly of attorney's fees, consideration of a ratio of punitive to all other damages does not assure that the punitive damages bear a rational relationship to *either* the plaintiff's costs of litigation *or* the extent of harm to the plaintiff. *See Amica Mutual Ins. Co. v. Schettler*, 768 P.2d 950, 967 (Utah Ct. App. 1989) (attorney's fees "go on neither side of the scale when determining whether the amount of punitive damages awarded 'bear[s] a reasonable relation' to the amount of general damages"); *Byler v. Garcia*, 685 S.W.2d 116, 120 (Tex. Ct. App. 1985) (trial court properly did not include attorney's fees award in its consideration of punitive damages).

If a state allows a jury or court to take into account the costs of litigation in awarding punitive damages, it has made a judgment that punitive damages should be higher when the plaintiff has not been compensated for his litigation expenses. If a trial or appellate court, however, calculates a ratio of punitive to compensatory damages for purposes of determining whether the award is excessive and *includes* an attorney's fees award in the denominator of the ratio without any other adjustment, the court has refused to give the defendant the benefit of the criteria the state purports to apply. If a greater amount of punitive damages is justified to reimburse a plaintiff for the costs of litigation, then a lesser award must be permitted when the costs of litigating already have been reimbursed.

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[17] (...continued)
also, Restatement (Second) Torts, § 908(2) (1977) (in assessing punitive damages the trier of fact can properly consider "the nature and extent of the harm to the plaintiff").

Moreover basing a ratio on the amount of attorney's fees incurred by the plaintiff in many cases will lead to absurd results. A defendant has no control over the energy and resources a plaintiff chooses to bring to bear in litigation. If the attorney's fees in this case had been $1 million, the line of reasoning of the court below would have required TXO to pay the $1 million as part of compensatory damages and a punitive damages award of $500 million. This approach becomes even more absurd, when, as is sometimes the case, plaintiff's counsel's fee award already is based on a multiplier.

When a state considers the amount of harm to the plaintiff in determining the appropriate size of a punitive damages award, the state's procedures for trial or appellate review of excessiveness also must take into account whether or not the plaintiff already has been compensated for the "harm" of incurring litigation expense to vindicate his rights. In the hypothetical situation described above, the plaintiffs in cases 1 and 2 suffered the same amount of harm. In case 2, before the award of punitive damages, the plaintiff was compensated for the harm done by the defendant's wrongful acts *and* for the cost of obtaining reimbursement for that harm (the attorney's fees award). The state's procedures for measuring the excessiveness of a punitive damages award may not irrationally measure "harm" to the plaintiff in case 1 without reference to the cost of vindicating rights but measure "harm" in case 2 as *including* the costs of bringing and prosecuting the lawsuit.

Thus, the "excessiveness" calculus engaged in by the West Virginia Supreme Court in this case did not assure adherence to the state's criteria for determining punitive damages. Unlike in *Haslip*, the "standards [do not] have real effect when applied by [the state supreme court] to jury awards." *Haslip*, 111 S.Ct. at 1045. Nor did the West Virginia Supreme Court's excessiveness inquiry ensure that punitive damages "have some understandable relationship to compensatory damages." *Id.* Consideration of an appropriate ratio of punitive to compensatory damages must assure consistency with the criteria chosen by the state for determining the amount of punitive damages. The court below, by contrast, utterly

ignored two of the state's rationales for award of punitive damages -- reimbursement for costs of suit and consideration of harm to the plaintiff -- by failing to recognize that the attorney's fees award itself reduced the need for a punitive damages award.

B. The West Virginia Supreme Court's Treatment Of The Attorney's Fees Award In The Punitive Damages Calculus Was Ad Hoc And Subjective

Just as a state cannot constitutionally deprive a defendant of property without some meaningful criteria for determining the amount of an award, it cannot constitutionally articulate valid criteria but refuse to apply them. Yet this is what was done here. The state of West Virginia appropriately determined that punitive damages should provide compensation to the plaintiff for the costs of the lawsuit. It also determined that punitive damages should be proportional to the harm to the plaintiff. But the West Virginia Supreme Court's purported application of these criteria in fact conflicts with them. As discussed above, the court refused to lower the punitive damages ratio in recognition of the fact that the award of attorney's fees already had served to compensate the plaintiff for costs of litigation and reduced the harmful effects of the defendant's conduct.

The state's imposition of punitive damages thus becomes impermissibly "arbitrary and capricious" and a violation of due process. See *Dent*, 129 U.S. at 124. As this Court stated in *Grayned*:

> [I]f arbitrary and discriminatory enforcement is to be prevented, laws must provide explicit standards for those who apply them. A vague law impermissibly delegates basic policy matters to policemen, judges, and juries for resolution on an *ad hoc* and subjective basis, with the attendant dangers of arbitrary and discriminatory application.

Grayned, 408 U.S. at 108-109. The West Virginia Supreme Court's application of its state's criteria for calculating punitive damages makes the criteria themselves "*ad hoc* and subjective." Compensation to the victim for his litigation expenses apparently may or may not affect the size of the punitive damages award depending on whether one looks to the general criteria applied by state decisional law prior to this case or the West Virginia Supreme Court's application of those criteria.

This Court has recognized that "concrete problems of constitutional dimension" under the due process clause sometimes may emerge through arbitrary and discriminatory enforcement of state law. *Village of Hoffman Estates v. Flipside, Hoffman Estates, Inc.*, 455 U.S. 489, 504 (1982), *citing Joseph E. Seagram & Sons, Inc. v. Hostetter*, 384 U.S. 35, 52 (1966). Such a problem has emerged here. Whatever guidance and predictability West Virginia's criteria for calculating punitive damages may have had in and of themselves, they lost those neutral qualities in the West Virginia Supreme Court's interpretation and application of those criteria in this case. West Virginia's purported test for when a punitive damages award is "excessive" violates the Due Process Clause.

III. THE WEST VIRGINIA SUPREME COURT'S SPECULATIVE CONSIDERATION OF "POTENTIAL HARM" ALSO WAS STANDARDLESS

In *Garnes v. Fleming Landfill, Inc.*, 413 S.E.2d 897 (W. Va. 1991), the West Virginia Supreme Court established a detailed system for addressing awards of punitive damages in compliance with the requirements of due process. 413 S.E.2d at 908. One of the criteria announced by *Garnes* was "that the punitive damages should bear a reasonable relationship to the *harm that is likely to occur from the defendant's conduct* as well as to the harm that actually has occurred." *Id.* at 909. (emphasis added). The court below, however, rather than engaging in a rational and meaningful determination of

whether the actual conduct of the defendant was *likely* to cause future harm, engaged in an arbitrary guessing game as to the potential harm by other conduct (and perhaps by other potential defendants) to other victims. The West Virginia Supreme Court's "objective" and "meaningful" review of the "harm that is likely to occur from the defendant's conduct" consisted of the following off-the-cuff remarks: "The *type* of fraudulent action intentionally undertaken by TXO in this case *could potentially* cause millions of dollars in damages to *other* victims. . . . Just as important, an award of this magnitude is necessary to discourage TXO from continuing its pattern and practice of fraud, trickery and deceit." Pet. App. 40A (emphasis added).

First, these comments bore absolutely no relationship to proceedings in the trial court in this case. The trial court instructed the jury to consider "the extent of the harm inflicted. . . ." Resp. App. B. This instruction took account only of *actual* harm to the plaintiff by the defendant. It did not ask the jury to consider, as the West Virginia Supreme Court did, other potential instances of the "type" of conduct engaged in by TXO. It did not allow the jury to speculate about "potential[]" harm from conduct that might occur in the future. The justices' conjecture about the actions TXO (or others) might take in the future, and the harm that "could" be caused to other unspecified victims, bore no relationship to any inquiry the jury was called upon to make. When *Haslip* stated that appellate review must provide an additional check on jury and trial court discretion, it could not have intended that the appellate court "check" the trier of fact by itself indulging in speculative inquiries that were not even considered in the trial court. *Haslip*, 111 S. Ct. at 1045.

Moreover the supreme court's "analysis" was not based on facts or evidence. Its statements rely on nothing more than the justices' conjecture. The jury's verdict in fact *contradicts* the West Virginia Supreme Court's conjecture. The appellee recovered $19,000 in compensatory damages on its slander of title claim -- the amount it cost the appellee to defend itself in the quiet title action brought by TXO. Pet. App. 20A. There was no

award suggesting a jury finding that TXO's actions had caused the Respondents any further harm, such as a lost opportunity involving another party. Thus, while the supreme court hypothesizes that the "type" of action engaged in by TXO "could potentially cause millions of dollars in damages to other victims," *id.* at 40A, it provides no insight into what these future actions might be or how they could cause multi-million dollar harm where so little resulted in this case. It is not enough that a state articulate criteria for determining the amount of a punitive damages award; the criteria must be meaningful in application. *See Village of Hoffman Estates*, 455 U.S. at 1196. In contrast with *Haslip*, here the "standards [did not] have real effect when applied. . . ." 111 S.Ct. at 1045.

Indeed the criteria articulated by the court below for determining "potential harm" are inherently standardless and are incapable of anything other than arbitrary and capricious application. *Any* "type" of fraudulent or tortious conduct "could potentially cause millions of dollars in damages to other victims" in some hypothetical circumstance. This inquiry is not confined to situations where tortious conduct already engaged in by the defendant is likely to cause harm to a definable group; as for example, where a car manufacturer has introduced a dangerously defective product into the chain of commerce and the number of purchasers may be ascertained. The "standard" applied by the court below encourages speculation about conduct that has not yet occurred (for example, creation of a new, even more defective product) and about the harm such conduct could cause an undefined number of hypothetical victims (including, perhaps, some number of "eggshell" plaintiffs).

The West Virginia Supreme Court's "potential harm" inquiry may go even further. In measuring potential harm from the "type of fraudulent action" engaged in by TXO, the court may have been considering harm from fraudulent activity by potential defendants *other than* TXO. The notion of punishing TXO because of possible conduct by others offends the most deeply seated concepts of justice. "No man should be punished for that of which he is not

guilty." *Lake Shore & M.S. Ry v. Prentice*, 147 U.S. 101, 115 (1893).

If a state's articulated criteria require an estimate to be made -- for example, an estimate of "potential harm" -- that estimate must be capable of having a sound evidentiary basis. Standards that call for sheer speculation will not do. The West Virginia Supreme Court's consideration of "potential harm" was divorced from the facts and evidence of the case, and encouraged speculation about indeterminate future actors, events, and effects. This inherently "*ad hoc* and subjective" inquiry, *Grayned*, 408 U.S. 109, lacked the "objective criteria" required by *Haslip*, 111 S.Ct. at 1046, and deprived TXO of due process.

CONCLUSION

Amicus curiae respectfully requests that the decision of the West Virginia Supreme Court be reversed.

Respectfully submitted,

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January 22, 1993